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Supreme Court, U.S.
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No. 91-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL RISK INSURERS,
Petitioner

v.

COTTON BROTHERS BAKING COMPANY, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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LIST OF PARTIES

Respondent supplements the list of parties submitted by Petitioner to add the following: Cotton Brothers, Inc., Adams T.L. Acquisitions Corporation, the Federal Deposit Insurance Corporation, R. Gene Cotton, W.F. Cotton, W.F. Cotton, Jr., Katherine M. Cotton, Katherine A. Cotton, W.F. Cotton, III, Nancy W. Cotton, Richard Gene Cotton, Jr., William Howard Cotton, Genevieve Tracy Cotton and Baker Perkins, Inc.

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v.

COTTON BROTHERS BAKING COMPANY, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The instant litigation arose out of a fire which destroyed a bakery business in Alexandria, Louisiana on Friday the thirteenth of February, 1981. Following protracted but fruitless negotiations, Cotton Brothers, Inc. ("Cotton"), the owner of the bakery business, filed suit in the United States District Court for the Western District of Louisiana in 1983 against both its insurer, Industrial Risk Insurers ("IRI") and Baker Perkins, Inc., an industrial baking equipment supplier which had contracted to deliver replacement equipment to Cotton within a specified time period. Although Cotton's claim against IRI and its claim against Baker Perkins were tried together, and both are dealt with in the opinion of the appellate court below, the petition for certiorari herein only involves the claim against IRI.

The trial court entered judgment in favor of Cotton and against IRI on July 31, 1989, and supported its decision with a 51-page opinion. Petition Appendix at 25a-72a. IRI prosecuted an appeal, seeking review of three issues decided by the trial court. One of those issues involved the denial of IRI's claim that $3,585,761.97 paid to Cotton under Section III of its policy, "EXPENSES RELATED TO REDUCING LOSS," should be credited against Section I of its policy, which entitles the insured to recover the "ACTUAL LOSS SUSTAINED" from the interruption of the insured's business (hereinafter referred to as "the credit issue"). IRI devoted a substantial portion of the Argument in its appellate brief to the credit issue. That issue was also the principal focus of its oral argument, and its reply brief was almost entirely dedicated to it.

On September 13, 1991, the Fifth Circuit Court of Appeals issued an opinion which modified the holding on the credit issue in IRI's favor, but otherwise affirmed the judgment of the district court. Both Cotton and IRI petitioned for rehearing. On October 10, 1991, the Fifth Circuit issued a second opinion, revising the amount of the net judgment in Cotton's favor. The Fifth Circuit's mandate in the case issued on November 4, 1991, but three weeks thereafter, on November 25, 1991, the court recalled its mandate *sua sponte*. On January 6, 1992, six weeks after the mandate was recalled, a third opinion was rendered which substituted new language on the credit issue, otherwise reaffirmed the prior holdings, and ordered the mandate to issue forthwith.

On January 15, 1992, IRI moved the district court to stay execution of the judgment pending a contemplated motion to the Fifth Circuit to recall its mandate or, alternatively, a petition to this Court for a writ of certiorari. The motion was denied, whereupon IRI petitioned the Fifth Circuit on January 20, 1992 for a writ of mandamus or, in the alternative, for an order staying enforcement of the mandate. This petition was also denied.

On February 3, 1992, IRI applied to Justice Scalia, in his capacity as Circuit Justice for the Fifth Circuit Court of Appeals, for a Stay of Enforcement pending a decision on a petition to this Court for a writ of certiorari. This application presented, in an abbreviated form, the same arguments contained in the pending writ petition, and it was denied. Opposition Appendix at 16a. On February 5, 1992, IRI finally moved the Fifth Circuit to recall its mandate. That motion was accompanied by a proposed Rehearing Petition and Suggestion for Rehearing En Banc, which presented to the Fifth Circuit, virtually *verbatim*, the same arguments made in the writ petition now pending before this Court. Opposition Appendix at 1a. The Fifth Circuit denied the motion to recall the mandate on March 6, 1992. In early April, IRI petitioned this Court for a writ of certiorari.

SUMMARY OF THE ARGUMENT

In its Petition for a Writ of Certiorari, IRI misstates both the law and the facts. IRI cannot point to a single case in which a United States Court of Appeals has affirmatively spoken to the issues IRI raises on appeal, and rejected the position taken by the Fifth Circuit. There simply is no conflict among the circuits. Moreover, everything done by the Fifth Circuit to correct its mistake in this case was within the sound discretion of the court. IRI cannot show an abuse of discretion. Each element of the Fifth Circuit's action is supported by ample precedent.

IRI's claim that it did not have its day in court is disingenuous, to say the least. IRI had *nine years* in court, and was heard on all of the issues, not once but many times.

IRI even goes so far as to ask for the wholly inappropriate remedy of reversal, thus raising questions about the proper scope of the Court's review of the judgment below, and the sufficiency of the record before the Court to entertain a remedy which goes to the merits of the

case. IRI is requesting the Court to overturn a decision on the merits on purely procedural grounds, without the benefit of briefing on the merits—an anomalous request from a party claiming to have been deprived of the chance to be heard.

There is absolutely nothing about this case that makes it a serious candidate for certiorari.

ARGUMENT

IRI promotes itself as the champion of finality: "at some point, there must be an end to litigation. . . ." Petition at 7. Cotton concurs wholeheartedly. This lawsuit began in 1983. IRI lost in the trial court and then in the court of appeals. IRI has briefed all the issues many times. Ironically, it is IRI which is now dragging this litigation into its ninth year.

But the instant writ petition is not about finality, nor is it about due process. IRI's unhappiness really stems from the resolution of the credit issue in Cotton's favor by the courts below. However, after nine years of losing on the merits, IRI apparently realizes that it must try a new strategy. That strategy consists of an attempt "to orbit to a constitutional apogee" an appellate court's prompt recall of a mandate to correct a mistake. *Cf. Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1168 (5th Cir. 1959). Neither the applicable law nor the facts of this case lend support to such an attempt.

I. IRI MISSTATES THE LAW: THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER U.S. COURT OF APPEALS ON THE SAME MATTER.

IRI informs the Court that it cannot find a reported case in which a court of appeals has recalled its mandate to grant a previously denied petition for rehearing, and then argues this shows there is a conflict among the circuits. It should come as no surprise that IRI cannot find a case exactly like this one: mandates are sparingly re-

called, and rehearings are seldom granted. But to establish a conflict among the circuits, IRI must show that at least one other circuit has *affirmatively spoken* on this issue, and has rejected the position taken by the Fifth Circuit. This it cannot do, because the applicable case law confirms that the action taken by the Fifth Circuit here is well within the discretionary power vested in an appellate court.

The authority of a court of appeals to recall its mandate is beyond question, even though there is no explicit provision for recall in the rules. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988); *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979). The analogy IRI attempts to draw between recall of a mandate and the ability of a district court to relieve a party from a judgment under the authority of Fed. R. Civ. P. 60 may be interesting from a scholarly point of view, but it is not controlling or even persuasive. There are significant differences between trial courts and courts of appeals. A suitor appeals as of right from the errors of a district court; a writ of certiorari is rarely granted by this Court, and then only when there are "special and important reasons therefor." Sup. Ct. R. 10.1. Hence, there is an urgency for a court of appeals to get it right. That is one reason why the "Rules of Civil Procedure apply to procedure in the District Courts, not to the Court of Appeals." *Hines v. Royal Indemnity Co.*, 253 F.2d 111, 113 (6th Cir. 1958) (collecting cases). It is also a reason why the decision to recall a mandate falls within the *discretion* of the court of appeals. *Zipfel*, at 567. That discretionary authority is explicitly recognized in Rule 41.2 of the Fifth Circuit's Local Rules, which acknowledges the appellate court's power to recall its mandate "to prevent injustice."

While it is certainly true, as IRI argues, that the Court's power to recall its mandate should be exercised sparingly, IRI cites no legal authority which directly sup-

ports its position that a mandate cannot be recalled when the members of the panel decide that a mistake has been made.[1] In *Legate v. Maloney*, 348 F.2d 164 (1st Cir. 1965), relied upon by IRI, the court decided it was inappropriate to reconsider its prior opinion *after* the Supreme Court had denied certiorari—a situation very different from the present circumstances. Although the court in *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963 (1st Cir. 1973), stated that "erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment," the First Circuit effectively did recall its mandate in that case to consider whether a subsequently decided Massachusetts state court decision called its earlier ruling into question. The court denied the Motion to Recall the Mandate and the Petition for Rehearing by reaching the merits of the alleged error; the panel then decided that the state court case was not applicable to the circumstances before it, and could not have been applied retroactively even if it had been relevant. In *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), the court discussed the considerations pertinent to recall of its prior mandate, but actually decided to again review the issues considered on the earlier appeal under the law of the case doctrine.

IRI acknowledges the Fifth Circuit may have acted to correct an injustice when it recalled the mandate. Petition at 5. Can there be a better reason for the exercise of discretionary authority? The decision whether to recall

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[1] It is wrong to assume, as IRI does, that the Fifth Circuit recalled its mandate because the judges changed their minds. There are other possibilities. For example, there may have been miscommunications between judges, law clerks, or other court personnel. The glaring arithmetical errors in the first reported opinion, noticed immediately by both parties and corrected by the Court in a second opinion on October 10, 1991, may have caused the Court to realize that something was amiss, and that it should take another look at this case.

a mandate falls squarely within the discretion of the court—discretion which the court may exercise for good cause, to prevent injustice, or in special circumstances. *American Iron and Steel Institute v. EPA*, 560 F.2d 589 (9th Cir. 1977). In the instant situation, the court had good cause to recall its November 4, 1991 mandate to prevent injustice to Cotton. The corrected opinion of January 6, 1992 denies IRI the benefit of what the district court held, and the court of appeals affirmed, constituted "stone-walling" tactics employed in bad faith against its insured. Petition Appendix at 77a. Given the nature and extent of IRI's bad faith, the Fifth Circuit acted properly in recalling the mandate once it became concerned that the original opinion was incorrect.

As both the *Powers* case, *supra*, and *United States v. Tulare Lake*, *supra*, demonstrate, courts have revisited the merits when deciding whether to recall a mandate. Courts have also recalled their mandates *sua sponte*. *See, e.g., Martin v. Walk, Haydel & Assoc., Inc.*, 794 F.2d 209, 211 (5th Cir. 1986). Courts have granted petitions for rehearing without requesting a response from other parties. *See, e.g., United States v. Allegheny-Ludlum Indus., Inc.*, 568 F.2d 1073, 1074 (5th Cir. 1978).[2] Courts have caused their mandates to issue "forthwith." *See, e.g., Ostrer v. United States*, 584 F.2d 594, 598 (2nd Cir. 1978); *Johnson v. Bechtel Assoc. Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). In fact, ample precedent exists for everything which happened in the court below. What does *not* exist is a decision by another U.S. Court of Appeals on the same matter that goes the other way. This case presents no conflict among the circuits which would warrant review by the United States Supreme Court.

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[2] Fed. R. App. P. 40 merely provides that petitions for rehearing will not "ordinarily" be granted in the absence of such a response. Clearly, a decision as to whether this was the "ordinary" case fell within the sound discretion of the appellate court.

II. IRI MISSTATES THE FACTS: THE INSTANT CASE IN NO WAY WARRANTS THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

IRI acknowledges that "[t]o undo a presumed error during the appropriate period is laudable." Petition at 7. It is clear from the substituted opinion that the Fifth Circuit recalled its mandate on November 25, 1991 to do exactly that—to undo an error during the appropriate period—in order to prevent injustice to Cotton. Fifth Circuit Local Rule 41.2. IRI acknowledges that an appellate court has inherent power to recall its mandate in the interest of justice, but argues that the power should not have been exercised here without some exceptional circumstances other than the panel's unanimous conviction, apparent from the substituted opinion, that a mistake had been made and should be corrected.

The Fifth Circuit recalled its mandate only three weeks after it was issued, and reached its revised decision only six weeks later; the time for seeking Supreme Court review following the October 10 ruling on the initial petitions for rehearing had not yet expired. IRI has made no allegation that any detriment was suffered through reliance on the initial issuance of the mandate during the three weeks before it was recalled. By paying the amount originally found due into the Court registry, IRI was relieved of any further obligation to pay legal interest on those sums.

IRI nevertheless complains that, as a result of the Fifth Circuit's direction that the mandate herein issue forthwith, "petitioner was not heard and, therefore, had no day in court." Petition at 10. To assess the weight that should be given to that contention, this Court should note that:

- IRI had a very lengthy trial on the credit issue, as noted by the district court in its opinion: "The principal issue between the parties during the entire period of trial from the middle of Septem-

ber 1986 until the Friday before Christmas of that year was the methodology to be used in the determination of earnings damages as provided in the policy . . . ." Petition Appendix at 27(a).

- After the district court rendered its judgment, IRI moved to alter or amend the judgment or, alternatively, for a new trial, and thoroughly briefed the credit issue in connection with that motion. The district court denied the motion on January 23, 1990.

- At the appellate level, more than 16 pages of IRI's 27-page Argument in its original brief were devoted to the credit issue. The credit issue was the focus of IRI's oral argument, and IRI's reply brief —the last word before the appeals court panel— was dedicated almost exclusively to the credit issue.

- As noted in the Statement of the Case, *supra*, the arguments contained in IRI's pending petition for writ of certiorari were presented, in a virtually *verbatim* fashion, to both the Fifth Circuit and to Justice Antonin Scalia in his capacity as Circuit Justice for the Fifth Circuit before being advanced yet again in the pending petition.

This is not the track record of a litigant that has not been heard.

It is instructive, in this connection, to look at the kinds of cases in which a court of appeals issues its mandate "forthwith," as the Fifth Circuit did here. A court may order immediate issuance of the mandate when it is "satisfied (1) that [the] court would not change its decision upon rehearing, much less hear the case en banc, and (2) that there is no reasonable likelihood that the Supreme Court would grant review." *Ostrer*, *supra* at 598.

After nine years of litigation and appeals, a unanimous Fifth Circuit panel plainly concluded that this case came well within the *Ostrer* standards, and therefore ordered its mandate to issue forthwith. The record fully supports

this conclusion. There is nothing here that warrants the exercise of the supervisory powers of the United States Supreme Court.

III. THE PETITION MISSTATES THE ISSUES THAT WOULD PROPERLY BE BEFORE THE COURT IF CERTIORARI WERE GRANTED.

At the close of its Petition, IRI asks for "summary reversal" in this case. Petition at 12. That request for relief does not comport with the questions IRI has presented for review, nor does it comport with the arguments IRI has advanced to justify review of those questions. The nub of IRI's complaint before this Court is that the Fifth Circuit did not explain the recall of its mandate, so IRI had no opportunity to be heard on the propriety of the recall. IRI maintains "the issues are procedural only" (Petition at 2), and Cotton agrees. The appropriate relief to be sought in these circumstances is a remand to the circuit court, for further proceedings consistent with this Court's instructions. IRI's request for a reversal of the Fifth Circuit's opinion, instead of a remand, raises questions about the proper scope of the Court's review of the judgment below, and the sufficiency of the record before the Court to entertain a remedy which goes to the merits of the case. Cotton is obliged to point these questions out to the Court now, pursuant to the pertinent provisions of Supreme Court Rule 15.1:

> In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstate-

> ments *in the brief in opposition* and not later. (Emphasis in original).

Even IRI is prepared to admit that the Fifth Circuit's current opinion, as amended after recall of the mandate, represents that court's view of what constitutes the just outcome on the merits in this case: "presumably the spontaneous recall of mandate was based on the Court's belief that it may have erred and that the error may have created an injustice." Petition at 5. But in seeking reversal instead of remand as a remedy, IRI is apparently asking this Court to reinstate a prior holding on the merits—a holding since rejected by the appellate court—without even the benefit of briefing on the merits, let alone a review of the record itself.[3] This is an anomalous request from a party invoking the old adage, "justice must satisfy the appearance of justice" (Petition at 10), as support for its writ petition. Indeed it is more than that: it is a confession that the IRI petition does not seek justice or due process, but only a result to IRI's liking. What IRI realizes it can never achieve on the merits, IRI hopes to achieve by challenging the discretionary procedural steps taken by the court of appeals, in a matter of weeks, to correct a mistake.

Supreme Court Rule 14.1 clearly provides that: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." But the relief requested by IRI goes beyond the scope of the questions

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[3] As a matter of substantive law, the Fifth Circuit's action in revising its prior holding was clearly correct. The original opinion completely ignored the well-established principle that the normal business interruption policy (such as the one in this case) affords the insured two separate and distinct types of coverage: one for actual business interruption losses and one for expenses incurred to reduce loss. A leading text in the field notes, with respect to the latter coverage, that "[a]lthough incorporated into the form itself, this provision really represents a supplementary contract." R. MORRISON, A. MILLER & S. PARIS, BUSINESS INTERRUPTION INSURANCE: ITS THEORY AND PRACTICE 102 (1986).

set forth for review in the Petition. The Petition should therefore be denied, because the briefs and record before the Court do not support consideration of the remedy sought by Petitioner.

CONCLUSION

This matter has absolutely none of the attributes that might qualify a case for certiorari. It is to be hoped, however, that one aspect of the instant petition still sets it apart from the others this Court receives, and that is its effrontery in suggesting the entire Fifth Circuit is subject to "outside influences" (Petition at 10) that lead to "lawless behavior" (Petition at 12).

Such remarks are made to attract attention, but they ought not be rewarded with it. They violate the spirit if not the letter of Supreme Court Rule 24.6; on this ground alone, IRI's petition deserves to be disregarded.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

90-4128

COTTON BROS. BAKING CO., INC.,
Plaintiff-Appellee,
versus
INDUSTRIAL RISK INSURERS,
Defendant-Appellant,

Appeal from the United States District Court
for the Western District of Louisiana

APPELLANT INDUSTRIAL RISK INSURERS' MOTION TO RECALL MANDATE

Industrial Risk Insurers (IRI) respectfully moves that this Court recall the mandate issued January 6, 1992 in the above-captioned case.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The substantive case involves the District Court's ruling that payments, prior to trial of the case, to an insured under a business interruption loss policy, need not be credited to the insurer. On appeal, this Court reversed on September 13, 1991, holding that failure to credit the payments would result in a double recovery by the insured. *Cotton Brothers Baking Co., Inc. v. IRI*, 941 F.2d 380 (5th Cir. 1991). (Attached hereto as Exhibit B.) Both parties filed petitions for rehearing, the insured's substantive, the insurer's pointing out technical mathe-

matical errors. Both were denied October 10, 1991, although technical changes were made in the original opinion. *Id.* (Attached hereto as Exhibit C.) The mandate issued November 4, 1991.

On November 25, 1991, the Court issued an order *sua sponte* recalling its November 4 mandate "pending further consideration of this case before this Court." (Attached hereto as Exhibit D.) The Court then, on January 6, 1992, issued a "Substituted Opinion on Rehearing" reviving Cotton Bros.' dead petition for rehearing and *pro tanto* reversing the previous opinions. The opinion ordered that the "mandate shall issue forthwith." *Cotton Brothers v. IRI*, —— F.2d — —(5th Cir. 1992) (Available on Westlaw at 1992 WL 738). (Attached hereto as Exhibit E.)

STATEMENT IN SUPPORT OF MOTION TO RECALL MANDATE

The procedural occurrences in this case from October 10, 1991 through January 6, 1992 are unprecedented. IRI's research discloses no case prior to the instant case where a federal court has recalled a mandate after petitions for rehearing raising the same issues were denied. The purpose of this motion to recall mandate is to revest this Court with jurisdiction so that the attached Petition for Rehearing and Suggestion for Rehearing En Banc may be filed questioning the unprecedented departure from normal procedures. (Attached hereto as Exhibit A.)

For reasons stated more fully in Exhibit A, a mandate may be recalled only in extraordinary circumstances for good cause to prevent an injustice. Local R. 41.2; *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971). Those stringent criteria are met in the instant case. (1) Circumstances are not merely extraordinary; they are unprecedented. IRI's research discloses no other case in any Circuit where a court recalled a mandate and subsequently reversed itself adopting the position of a petition for rehearing previously denied. Added to that are

two additional unprecedented factors. The Court revived a dead petition for rehearing and never requested a response to it as contemplated by Fed. R. App. P. 40(a), and nowhere did the Court offer a word in explanation for its actions. (2) There is good cause for recall. The Court ordered the mandate to issue forthwith thereby precluding the orderly process of simply filing a Petition for Rehearing. Had the Court stayed the mandate for the normal 21 days, this extraordinary motion would have been unnecessary. (3) The recall will prevent an injustice. For reasons stated far more fully in the exhibits the cumulative effect of the unprecedented actions between October 10, 1991 and January 6, 1992 violated the norms of procedural regularity inherent in due process of law and brought the "integrity of its own process," *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988), into question thereby raising questions about the fair and orderly administration of justice within this Circuit.

For the above reasons, as elaborated on in Exhibit A, the mandate should be recalled.

Dated this 5th day of February, 1992.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

90-4128

COTTON BROS. BAKING CO., INC.,
Plaintiff-Appellee,

versus

INDUSTRIAL RISK INSURERS,
Defendant-Appellant,

Appeal from the United States District Court
for the Western District of Louisiana

APPELLANT INDUSTRIAL RISK INSURERS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

STATEMENT OF THE ISSUES

The issues all grow out of the procedural posture of the instant case following denial of the petitions for rehearing and issuance of the mandate: *e.g.*, (1) *sua sponte* recall of the mandate; (2) the failure to request a response from IRI to the petition for rehearing filed (and denied) by Cotton Bros. when (3) the Court was to adopt Cotton Bros.' previously denied petition for rehearing, and (4) not providing any reasons for any of the above.

1. May a court order *sua sponte* recall of the mandate to change its own final decision because the Court concludes it was wrong?

2. Do the principles of due process inherent in Fed. R. App. P. 40(a) allow a court to dispense with a response

to a previously denied petition for rehearing prior to granting it in circumstances where the grant is not based on an intervening judicial decision?

3. Must a court provide an explanation for recall of mandate and subsequent reversal of judgment?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The substantive case involves the District Court's ruling that payments, prior to trial of the case, to an insured under a business interruption loss policy, need not be credited to the insurer. On appeal, this Court reversed on September 13, 1991, holding that failure to credit the payments would result in a double recovery by the insured. *Cotton Brothers Baking Co., Inc. v. IRI*, 941 F.2d 380 (5th Cir. 1991). Both parties filed petitions for rehearing, the insured's substantive, the insurer's pointing out technical mathematical errors. Both were denied October 10, 1991, although technical changes were made in the original opinion.[1] *Id.* The mandate issued November 4, 1991.

On November 25, 1991, 46 days after denial of the petitions for rehearing, the Court issued an order *sua sponte* recalling its November 4 mandate "pending further consideration of this case before this Court."[2] The Court then, on January 6, 1992, issued a "Substituted

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[1] The case, both at trial and on appeal, involved a third party, Baker Perkins, Inc., an industrial baking supplier who contracted to install replacement equipment after the fire that caused the business interruption. There were delays which both parties attributed to the other. At trial, Cotton Bros. obtained a judgment against Baker Perkins which was affirmed in part and reversed in part on appeal. Petitions for rehearing were denied along with the others on October 10, 1991.

[2] When counsel for the parties called the Clerk of the Court to ask for information, they were told not to file any papers unless requested to do so. There was no request.

Opinion on Rehearing" reviving Cotton Bros.' dead petition for rehearing and *pro tanto* reversing the previous opinions.[3] *Cotton Brothers v. IRI*, —— F.2d —— (5th Cir. 1992) (Available on Westlaw at 1992 WL 738). The January 6 opinion ordered that the "mandate shall issue forthwith."

ARGUMENT AND AUTHORITIES

The handling of this case presents this Court with important and serious questions relating to the fair and orderly administration of justice within this Circuit as well as disregard for the applicable law of the Circuit. The January 6 "Substituted Opinion on Rehearing," although described as merely a revision and correction of the September 13 opinion granted all the relief Cotton Bros. requested in its petition for rehearing with a resulting five-fold increase in IRI's liability to Cotton Bros. In the opinions of September 13 and October 10, the Court ruled that the "failure to credit IRI for its prior payments would result in a double recovery by Cotton Bros." 941 F.2d at 385. The opinion of January 6 reversed that conclusion, finding that the "record is devoid of acceptable evidence showing IRI made any payments whatever for business interruption losses." 1992 WL at 740. In making that determination, the Court became the first federal court to recall a mandate and reverse a judgment after denial of a petition for rehearing raising the same issues. To do so, the Court had to revive a dead petition for rehearing to which there had been neither a need, nor a call, to respond by IRI, the then-prevailing party. That, too, is unprecedented.

The Court changed its mind on the double recovery issue, but offered no explanation for its course of conduct: (1) There was no statement of the reasons for the recall of the mandate *sue sponte*. (2) There was no mention

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[3] The judgment against Baker Perkins was unaffected as was a judgment for $324,735 against IRI on a separate fire loss policy.

of Fifth Circuit Local Rule 41.2: "A mandate once issued shall not be recalled except to prevent injustice." (3) There was no statement why IRI—which was to lose—was not allowed a chance to respond as contemplated by Fed. R. App. P. 40(a). (4) Nor was there a word offered as to why a decision on the merits that was correct on September 13, correct on October 10, final on November 4, was questionable November 25, and wrong on January 6.

What the Court did is without precedent. Courts do not recall mandates without any external stimulation simply because the judges subsequently come to the conclusion that they erred. To do so would undermine the concept of finality. The problem is not a new one; courts have spoken forcefully to the need for finality even in the face of an erroneous judgment. As Justice Harlan stated: "I can think of nothing more unsettling to lawyers and litigents, and more disturbing to their confidence in the even-handedness of the Court's processes, than to be left in . . . uncertainty . . . as to when their cases may be considered finally closed in this Court." *United States v. Ohio Power Co.*, 353 U.S. 98, 111 (1957) (dissenting opinion). There is *no* dissent from the proposition that a final judgment once issued remains final except in extraordinarily limited circumstances—and those circumstances specifically exclude change of mind by the judges. *See, e.g., Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965) ("If [the Court] were in error . . . it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari"); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) ("Alleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment not void when issued"); *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 715 (9th Cir. 1982), (citing 16 C. Wright, A. Miller, E. Cooper and E. Gressman, *Federal Practice and Procedure* § 3938 at 284-85 (1977) [hereinafter Wright & Miller]) ("a conviction

that the court erred [is] ordinarily not alone sufficient grounds for recall of mandate after final judgment") *vacated on other grounds*, 459 U.S. 1095 (1983). IRI's research discloses no prior case wherein a federal court has recalled a mandate and then granted a petition for rehearing that previously had been denied.

Every Circuit has spoken to the issue of recall of mandate. "All of the courts of appeals emphasized that recall of a mandate is an extraordinary remedy, to be used sparingly.' *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 594 (9th Cir. 1977); Wright & Miller § 3938 at 279. *Legate* expresses the rationale succinctly: "There must be an end to dispute." 348 F.2d at 166.

Because the power to recall is "part of the court's power to protect the integrity of its own process," *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988), it must be used consistently with the court's own processes. Only when extraordinary circumstances creating an obvious injustice occur is a departure from normal procedures even thinkable. When there are compelling reasons for a departure from the routine, when the changes are more than merely clerical, it is incumbent on the court to articulate clearly the basis for its departure. The principles inherent in due process of law demand no less, for justice must not only be done, it must also appear to be done.

Cotton Bros. would have had no basis to file a motion for recall of the mandate. Had Cotton Bros. done so, the motion would have been denied out of hand since none of the basic prerequisites for granting the motion could be shown to exist. By acting *sua sponte*, the Court gave to Cotton Bros. a remedy that even it would not have sought. Recall of a mandate, while allowable, is only done under extraordinary circumstances for good cause and to prevent injustice. Litigants are entitled to rely on the salutary principle that a legal contraversy has a known ending; courts need to clear dockets and decide new claims.

American Iron & Steel Institute, 560 F.2d at 592. Only in exceptional circumstances "should the doctrine of repose admit of disturbance to settled litigation." *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980). The parties understood the meaning of finality. They had agreed upon the amount necessary to satisfy the judgment, and twenty-one days after the petitions for rehearing were denied IRI deposited that agreed amount into the Registry of Court.

Judge Leventhal's *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971) provides an "exhaustive and scholarly" analysis of recall of mandate decisions. *Wright & Miller* § 3938 at 288. Judge Leventhal's list of exceptions to the general rule of repose begins with the obvious need to correct clerical mistakes. Beyond that, the examples he found for extraordinary circumstances to prevent an injustice were (1) fraud on the court,[4] (2) avoiding different results in similar cases pending at the same time,[5] (3) the need to revise unintended instructions to the trial court which would produce an unjust result, and (4) a catch-all "other" category based on reasons that would support an independent suit at the trial court.

The federal courts authorize recall [6] to correct unanticipated and unintended consequences to a party, to allow an award for interest from the day of first judgment,[7]

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[4] *See, e.g., Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (5th Cir. 1971).

[5] As illustrated by *Gradsky v. United States*, 376 F.2d 993 (5th Cir. 1967), where this Court recalled a mandate to give some defendants the benefit of a Supreme Court remand obtained by their co-conspirators.

[6] Note, *Recall of Appellate Mandates in Federal Civil Litigation*, 64 Cornell L. Rev. 704 (1979).

[7] There are nine such cases in this Circuit, the most recent being *Masinter v. Tenneco Oil Co.*, 934 F.2d 67 (5th Cir. 1991).

to provide equal justice for those similarly situated,[8] to allow a criminal defendant an opportunity to petition for certiorari,[9] and to prevent fraud on the court. Judge Leventhal had no example of a court changing its mind. To the contrary, *Legate v. Maloney* had specifically denied the appropriateness of action under that circumstance and Judge Leventhal agreed. Thus he looked to the "special reason, 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation." 348 F.2d. at 278 (*quoting Hines v. Royal Indemnity*, 253 F.2d 111, 114 (6th Cir. 1958). *See also*, *Iverson v. IRS*, 257 F.2d 408 (8th Cir. 1958). A good example would be *Zipfel* where an intervening Supreme Court decision departed in a "pivotal" aspect from the original circuit opinion. 861 F.2d at 567.

What occurred in the instant case is no correction of a clerical error, no erasing of an unintended instruction and there is no second or intervening case. The September 13 opinion ruled on the merits that IRI's payments to Cotton Bros. under the insurance policy should be credited to IRI in determining the amount of business interruption loss. Cottton Bros. then devoted nine and a half pages of its petition for rehearing to arguing that the recovery of both extra expenses and earnings loss is not a prohibited double recovery. Cotton Bros.' position was rejected in the denial of rehearing on October 10. Thereafter, Cotton Bros. made no effort to seek reconsideration of the Court's denial of the peti-

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[8] Wright & Miller note the clash of strong federal policies that diversity cases be decided similarly and appreciation of the values of repose. "The obvious present stopping point would be a requirement that relief is available only if different results have been reached in cases growing out of a single historic setting." § 3938 at 287. Fully implicit in that analysis is that simple correction of a mistaken opinion is not a justifiable reason for reopening a closed case.

[9] *E.g., Smith v. Blackmon*, 677 F.2d 20 (5th Cir. 1982); *Ordonez v. United States*, 588 F.2d 488 (5th Cir. 1978).

tion for rehearing. Yet, 46 days after rejecting Cotton Bros.' position on the double recovery issue (for a second time), the Court, on its own motion, and without explanation, decided to look at the issue for a third time. It then adopted Cotton Bros.' position in the "revised and corrected" January 6 opinion.[10] The Court changed its mind!

IRI's research discloses: (1) This Court has never recalled a mandate simply because judges changed their minds about the proper outcome. (2) This Court has never recalled a mandate after denying petitions for rehearing or suggestion for rehearing en banc where the same substantive issue was involved. (3) There are no cases in this Circuit where the Court recalled its mandate and issued a substituted opinion reaching an entirely different result.[11] (4) Finally, research of all Circuits discloses no case where a Court recalled a mandate after petitions for rehearing or suggestions for rehearing en banc raising the same issues were denied. The instant case stands nakedly alone.

To second-guess is human. To undo a presumed error during the appropriate period is laudable. But to undo a final judgment without extraordinary circumstances (or explanation) brings the integrity of the process into question.

It does not matter if judges subsequently conclude they erred; once a judgment is final, the mandate may not be recalled for that reason. More justification is required but, in the instant case, there is no more. The Court offered none in its "Substituted Opinion on Re-

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[10] The January 6 opinion left unaffected the judgment against Baker Perkins. It also let stand the $324,735 judgment against IRI under the fire loss policy. The revision and correction was on the double recovery issue, a reversal that resulted in a five-fold increase in IRI's liability to Cotton Bros.

[11] See note 10 *supra*.

hearing" and Cotton Bros. quite obviously had nothing to that effect in its petition for rehearing (because the law does not require showing extraordinary circumstances in a petition for rehearing). The lack of justification for upsetting a final judgment was only the first error committed by the Court. The failure to obtain a response to the previously denied, but now apparently revived, petition for rehearing was the second. The third and topping error came when the Court offered no explanation for any of its actions.

Although Fed. R. App. P. 40(a) does not facially require a response to a petition for rehearing prior to a grant thereof, the use of "ordinarily" means that it will be the exceptional situation when one is not requested. "If the court finds any possible merit in the petition, the court will direct its clerk to request that the prevailing party file an answer within a specified time." *Wright & Miller* § 3986 at 473. Robert L. Stern explains that the rules forbidding the filing of a reply without a request from the court protect the prevailing counsel (who otherwise would feel the necessity of replying). While courts may proceed on their own without responses when the granting of a rehearing rests "on considerations with which the Court is fully familiar and can evaluate for itself . . . they are not likely to do so in other circumstances when a response would be helpful to the court as well as to the respondent." Appellate Practice in the United States 463 (1989). The parties are most familiar with their record, and as Judge Timbers wrote: "Cutting off appellee's right to respond not only is grossly unfair to the appellees and their counsel; it deprives the Court of what may very well be critical information which may cast serious doubt on the propriety of granting" the petition for rehearing. *Davis v. Smith*, 607 F.2d 535, 541 (2d Cir. 1978) (dissenting).

United States v. Allegheny-Ludlum Industries, Inc., 568 F.2d 1073 (5th Cir. 1978), illustrates the limited cir-

cumstances when it is appropriate to go forward without requesting a response. Because an intervening Supreme Court decision "squarely and unequivocally determines the issue" in the case, "we see no occasion to request a response to the petition for rehearing." *Id.* at 1074. This Circuit's construction of "ordinarily"—that a response may be dispensed with only when nothing could be offered—is consistent with what both Wright & Miller and Stern find to be the appellate practice of the United States. Only in the most extraordinary and limited circumstances may a response be dispensed with prior to granting a petition for rehearing.

In the instant case, the failure to call for a response aggravates and is aggravated by the Court's omission of any reasoning for (1) the *sua sponte* recall or (2) its change of mind. Often opinions will select one of two available theories without providing an elaboration of why one was selected over the other. While this is not to be encouraged, it is a necessary part of the judicial process and it even occurs at the time of filing some substituted opinions on rehearing. But once a decision becomes final, it cannot be unsettled without reason. Implicit in both due process of law and the fair and impartial administration of justice is that when a change occurs to upset finality, there must be an explanation of the reasons for the change. What might have been "enough" at the initial or rehearing stage is no longer sufficient when a final judgment is to be overturned. This is basic and, indeed, implicit in the recall of mandate decisions discussed earlier. Judge Leventhal could summarize the area because courts knew that they were obligated to explain a change in a final determination.

This is, of course, precisely the obligation that courts and Congress have imposed on administrative agencies. Whatever the freedom to make an initial choice of policy, a change of policy must be explained and justified. As the Supreme Court stated in *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S.

29, 56 (1983), "while the agency is entitled to change its view . . . it is obligated to explain its reasons for doing so." To fail to explain renders the decision arbitrary and capricious. Although there may be a higher requirement of explanation imposed on agencies than courts, decisions undoing final determinations and short-circuiting routine procedures are arbitrary and capricious unless they are explained.

Once explanation becomes necessary, as here, hearing both sides becomes mandatory as well. There can be no reasoned explanation if the decision-maker is unaware of the relevant arguments a party would present.

The instant case, so far as IRI's research discloses, stands alone in recalling a mandate for reasons provided by the petition for rehearing formerly considered and rejected. Yet to say merely that it is wrong fails to capture the totality of the circumstances, which the *sua sponte* action, the failure to request a response as Fed. R. App. P. 40(a) contemplates and the issuing of the mandate forthwith rather than providing time for the sure-to-follow motions from IRI.

From the January 6 opinion, it is impossible to tell if the Court intended to depart so completely from this Circuit's norms of procedural regularity. It is unascertainable if the Court understood that it takes exceptional circumstances to recall a mandate and that a response to a petition for rehearing is all but mandatory if there is anything a respondent could say that might affect the judgment. All that is ascertainable is that the only thing "exceptional" about this case is the procedural anomalies, none of which reflects favorably on the administration of justice.[12] At stake, in *Zipfel's* words, is the "integrity of

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[12] It is also ascertainable that the District Judge, The Honorable Nauman S. Scott, sat by designation with the Fifth Circuit on November 4-7, 1991, between the issuance of the mandate on November 4 and its *sua sponte* recall on November 25. IRI is not accusing Judge Scott or any other judge of any impropriety. IRI does not know if Judge Scott ever talked with any member of the Fifth Circuit panel about its original opinion, and even if he did,

[the Court's] own process." 861 F.2d at 567. It seems clear that no one gave any thought to the cumulative effect of the decision-making between October 10, 1991 and January 6, 1992. As a result, it crossed over the line between legal error and lawless behavior and thereby violated the Due Process Clause of the Fifth Amendment.

CONCLUSION

For the above reasons, the Suggestion for a Rehearing En Banc should be granted and the Court should reinstate the opinion and judgment contained in the mandate that issued November 4, 1991.

Dated this 5th day of February, 1992.

Respectfully submitted,

ZELLE & LARSON

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there is obviously nothing improper with a District Judge discussing his former case with Circuit Judges after their final decision in the matter. But a reasonable person, who is uninformed about the internal workings of the court, might believe that the *sua sponte* recall of the mandate and then reversal of the decision was the result of improper judicial lobbying. It is essential to public confidence in the fairness and impartiality of the judicial system that the appearance of injustice never intrude into decision making.

IN THE SUPREME COURT
OF THE UNITED STATES

No. 562

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff,

v.

INDUSTRIAL RISK INSURERS,
Defendant/Petitioner.

APPLICATION TO STAY ENFORCEMENT PENDING DECISION ON A TIMELY FILED PETITION FOR CERTIORARI

TO: THE HONORABLE ANTONIN SCALIA, CIRCUIT JUSTICE FOR THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Industrial Risk Insurers[1] (IRI), seeks a stay of enforcement pending decision on a petition for certiorari to prevent from becoming practically irreversible a judgment resulting from a proceeding in the Court of Appeals that "has so far departed from the accepted and usual course of judicial proceedings," S. Ct. R. 10, that it is literally without precedent. The unique procedure below so clearly conflicts with the Federal Rules of Appellate Procedure, and so apparently denies IRI the most fundamental guarantee of Due Process, that this Court should intervene to restore the substance and appearance of justice.

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[1] See attached Exhibit A for a list of companies who are responsible on the policy in question.

A simple chronology of events makes the procedural defects below self-evident:

- *July 31, 1989*: the District Court, following trial to the Court, enters judgment against IRI and in favor of Cotton Brothers Baking Company, Inc. (Cotton Bros.) for $4,396,000 plus interest.

- *September 13, 1991*: the Fifth Circuit enters an opinion that reduces the judgment to $810,000 plus interest because the District Court's failure to credit IRI for payments made prior to trial "would result in a double recovery." 941 F.2d 380, 385 (5th Cir. 1991). (Attached hereto as Exhibit B.)

- *October 10, 1991*: the Fifth Circuit panel denies petitions for rehearing from both sides, although it does make some minor technical corrections in its opinion. (Attached hereto as Exhibit C.)

- *November 4, 1991*: the Fifth Circuit's mandate issues.

- *November 4-7, 1991*: the trial judge sits by designation with the Fifth Circuit.

- *November 4, 1991*: IRI deposits into the Registry of Court the amount the parties agreed was necessary to satisfy the judgment.

- *November 25, 1991*: the Fifth Circuit panel *sua sponte* recalls its mandate "pending further consideration of this case before this Court." (Attached hereto as Exhibit D.)

- *January 6, 1992*: without ever having allowed IRI to respond to Cotton Bros.' petition for rehearing, the Fifth Circuit "revises and corrects" its opinion to affirm the entire original judgment against IRI. (Attached hereto as Exhibit E.)

- *January 6, 1992*: the panel orders that the mandate issue forthwith.

REASONS FOR GRANTING THE STAY

A. *THE QUESTIONS ARE SUBSTANTIAL.*

The handling of this case presents this Court with important and serious questions relating to the fair and orderly administration of justice by the federal courts. IRI will present this Court with issues relating to: (1) the limits on the inherent power of an appellate court to unsettle its own final judgment; (2) the propriety of granting a substantive motion for rehearing under Fed. R. App. P. 40(a) without giving the opposing party an opportunity to respond; and (3) the appearance of propriety and the integrity of the appellate process.

1. By Recalling Its Mandate *Sua Sponte*, the Fifth Circuit Disregarded the Finality Doctrine.

The January 6 "Substituted Opinion on Rehearing," although described as merely a revision and correction of the September 13 opinion, granted the relief Cotton Bros. requested in its petition for rehearing. In the opinions of September 13 and October 10, the Court ruled that the "failure to credit IRI for its prior payments would result in a double recovery by Cotton Bros." 941 F.2d at 385. The opinion of January 6 reversed that conclusion.

What the court did is without precedent. Courts do not recall mandates simply because the judges subsequently come to the conclusion that they erred. To do so would undermine the concept of finality. The problem is not a new one; courts have spoken forcefully to the need for finality even in the face of an erroneous judgment. As Justice Harlan stated: "I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes, than to be left in . . . uncertainty . . . as to when their cases may be considered finally closed in this Court." *United States v. Ohio Power Co.*, 353 U.S. 98, 111 (1957) (dissenting opinion).

There is *no* dissent from the proposition that a final judgment remains final except in limited extraordinarily circumstances—and those circumstances specifically exclude change of mind by the judges. *See, e.g., Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965) ("If [the Court] were in error . . . it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari"); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) ("Alleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment not void when issued"); *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 715 (9th Cir. 1982) (citing 16 C. Wright, A. Miller, E. Cooper and E. Gressman, *Federal Practice and Procedure* § 3938 at 284-85 (1977) [hereinafter Wright & Miller]) ("a conviction that the court erred [is] ordinarily not alone sufficient grounds for recall of mandate after final judgment"), *vacated on other grounds*, 459 U.S. 1095 (1983). IRI's research discloses no prior case wherein a federal court has recalled a mandate and then granted a petition for rehearing that it had previously denied.

Every Circuit has spoken to the issue of recall of mandate. "All of the courts of appeals emphasized that recall of a mandate is an extraordinary remedy, one to be used sparingly." *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 594 (9th Cir. 1977); Wright & Miller § 3938 at 279. *Legate* expresses the rationale succinctly: "There must be an end to dispute." 348 F.2d at 166.

Litigants are entitled to rely on the salutary principle that a legal controversy has a known ending; courts need to clear dockets and decide new claims. *American Iron & Steel Institute*, 560 F.2d at 592. Only in exceptional circumstances "should the doctrine of repose admit of disturbance to settled litigation." *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980). The parties understood

the meaning of finality. They had agreed upon the amount necessary to satisfy the judgment, and twenty-one days after the petitions for rehearing were denied, IRI deposited that agreed amount into the Registry of Court.

Greater Boston Television Corp. v. FCC, 463 F.2d 268 (D.C. Cir. 1971) (Leventhal, J.), *cert. denied*, 406 U.S. 950 (1972), provides an "exhaustive and scholarly" analysis of recall of mandate decisions. *Wright & Miller* § 3938 at 288. *Greater Boston's* list of exceptions to the general rule of repose begins with the obvious need to correct clerical mistakes. Beyond that, the extraordinary circumstances sufficient to justify recalling a mandate are limited to: (1) fraud on the court, (2) avoiding different results in similar cases pending at the same time, (3) the need to revise unintended instructions to the trial court which would produce an unjust result, and (4) a catch-all "other" category based on reasons that would support an independent suit at the trial court.

What occurred here fits none of the recognized grounds for recall of a mandate. The September 13 opinion ruled on the merits that IRI's payments to Cotton Bros. under the insurance policy should be credited to IRI to avoid a double recovery. Cotton Bros. then devoted nine and a half pages of its petition for rehearing to arguing against this holding. The Fifth Circuit rejected Cotton Bros.' position by denying rehearing on October 10. The parties acted in reliance. Mandate issued. The Court changed its mind in the "revised and corrected" January 6, opinion. No word was offered as to why a decision on the merits that was correct on September 13, correct on October 10, and *final* on November 4, was questionable on November 25 and wrong on January 6.

2. The Procedure Followed Below Conflicts with Fed. R. App. P. 40(a).

Rule 40(a) provides that "[n]o answer to a petition for rehearing will be received unless requested by the

court, ..." As the Advisory Committee on Appellate Rules explained, this provision was "included to save time and expense to the party victorious on appeal." Federal Civil Justice Procedure and Rules 424 (West 1991 rev. ed.). Petitions for rehearing are so rarely granted that the rulemakers did not want to burden the victors with the need to respond unless there was some reason to do so. Wright & Miller § 3986 at 473.

Rule 40(a) specifically provides, however, that "a petition for rehearing will ordinarily not be granted in the absence of" a request for a response. Except for those extraordinary situations when nothing convincing can possibly be said in response, such as a directly controlling intervening decision of this Court,[2] the courts of appeals typically call for a response "[i]f the court finds any possible merit in the petition . . . ." Wright & Miller § 3986 at 473.

No extraordinary circumstance explains the appellate panel's deviation from standard procedure in this case. The only unusual aspect of this case is the fact that the Court of Appeals found no merit in the petition filed by Cotton Bros. until six weeks after it had denied that petition. That fact certainly cannot suggest that a response would have been futile.

In short, there is no excuse and no justification for the Court's failure to accord IRI the most basic element of due process, the right to respond before judgment was entered against it. To preserve the integrity of the federal appellate process, this Court should hold that Rule 40(a) guaranteed IRI that fundamental right.

3. The Procedural Irregularities Compromise the Appearance of Propriety and Integrity of the Appellate System.

The instant case stands alone in recalling a mandate for reasons provided by a petition for rehearing formerly

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[2] *E.g., United States v. Allegheny-Ludlum Industries, Inc.*, 568 F.2d 1073, 1074 (5th Cir. 1978).

considered and rejected. Yet to say merely that it is wrong fails to capture the totality of the circumstances, which include the *sua sponte* action, the failure to request the response contemplated in Fed. R. App. P. 40(a) and the issuing of the mandate forthwith rather than providing time for the sure-to-follow motions from IRI. These significant and unexplained departures from appellate rules and procedures fly in the face of "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine v. United States*, 362 U.S. 610, 616 (1960) (*quoting Offut v. United States*, 348 U.S. 11, 14 (1954); *see also, Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813, 825 (1986) (*quoting In re Murchison*, 349 U.S. 133, 146 (1955)).

Because the power to recall is "part of the court's power to protect the integrity of its own process," *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988), it must be used consistently with the court's own processes. Only when extraordinary circumstances creating an obvious injustice occur is a departure from normal procedures even thinkable. When there are compelling reasons for a departure from the routine, when the changes are more than merely clerical, it is incumbent on the court to articulate clearly the basis for its departure. The principles inherent in Due Process of Law demand no less, for justice must not only be done, it must also appear to be done.

Each of the Fifth Circuit's departures from the norm —its *sua sponte* recall of mandate without explanation, its failure to allow IRI to respond to the revived petition for rehearing and its rush return of the mandate—marks this as a truly extraordinary case. Yet the only thing "exceptional about this case is the procedural anomalies, none of which reflects favorably on the administration of justice.[3] Redress for these procedural improprieties rests

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[3] IRI is not accusing Judge Scott or any other judge of any impropriety. IRI does not know if Judge Scott ever talked with any

with this Court's "supervisory power over federal courts . . . to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 648, n.7 (1987). That exercise is necessary to reverse a course of decision-making that crossed over the line between legal error and lawless behavior and thereby violated the Due Process Clause of the Fifth Amendment.

B. *AN ORDER FROM THIS COURT MAINTAINING THE* STATUS QUO *IS NECESSARY TO PREVENT IRREPARABLE INJURY.*

The procedural posture of this case since the denial of rehearings on October 10, 1991 creates important issues: All the relief IRI seeks herein is to maintain the *status quo* pending decision on a petition for certiorari. If IRI should ultimately prevail, then any execution of the judgment will have been erroneous and harmful to IRI. Although it is unclear who will benefit from sums paid in satisfaction of the judgment,[4] what is certain is that any sum, once paid, may be irretrievable by IRI if its appellate remedies are granted. It is clear that none of the funds will remain with the named plaintiff Cotton Bros.

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member of the Fifth Circuit panel, and even if he did there is obviously nothing improper with a District Judge discussing his case with Circuit Judges after their final decision in the matter. But a person who knows only the publicly available facts might reasonably believe that the *sua sponte* recall of the mandate and subsequent reversal of the decision may have resulted from something Judge Scott said to the Court of Appeals, to which IRI was never allowed to respond. It is essential to public confidence in the fairness and impartiality of the judicial system that the appearance of injustice never intrude into decision making. The safest way to avoid an impression of unfairness is to adhere to procedural regularity.

[4] On January 24, 1992, R. Gene Cotton and others petitioned the District Court for permission to intervene on the grounds that petitioners are entitled to the sums paid by IRI in satisfaction of the judgment. On January 27, 1992, prior to IRI's receipt of the petition, Judge Scott issued an order granting the petition.

When Cotton Bros. was sold to American Bakeries Company in 1985, the purchase agreement specified that any proceeds of this litigation were to be shared between the shareholders of Cotton Bros. and American Bakeries. Adams T.L. Acquisition Corp. (Adams T.L.) is the successor to American Bakeries Company. Any sums paid to Adams T.L. are subject to a lien of the Federal Deposit Insurance Corporation. Any sums paid to Cotton Bros. will be disbursed to its shareholders. In either instance, satisfaction of the judgment will result in the payment of money which IRI may be unable to recover if IRI is successful. Therefore, a stay is necessary to prevent this irreparable harm.

Furthermore, absent relief from this Court, IRI faces an imediate loss in the form of execution fees in Connecticut, IRI's home state, where Cotton Bros. has now retained local counsel to seek recovery of the nearly seven million dollars outstanding on the award of January 6, 1992. Under Connecticut's post-judgment execution statutes,[5] Cotton Bros. can levy upon IRI's bank accounts and only thereafter provide IRI its first notice of execution. Conn. Gen. Stat. §§ 52-351a, 52-367a (1991). Moreover, Connecticut allows a sheriff's fee of ten percent (10%) of the amount collected. 1991 Conn. Pub. Acts 350 § 2 would generate a sheriff's fee of $700,000. There is no (effective Oct. 1, 1991). Thus, a seven million dollar levy statutory procedure in Connecticut providing for recoupment of a sheriff's fee if the executed judgment should subsequently be set aside. Thus, IRI might find itself victorious but out $700,000. All this can be avoided by the grant of a temporary stay of mandate until this Court disposes of the petition for certiorari. On February 3, 1992, the United States District Court for the District of Connecticut granted IRI a stay of enforcement of the judgment until February 5, 1992 at 10:00 a.m. to allow your Honor to consider this stay application.

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[5] The state practices and procedures governing execution of a judgment apply pursuant to Fed. R. Civ. P. 62(f), 69(a).

Because the January 6, 1992 opinion ordered the "mandate shall issue forthwith," jurisdiction reverted to the District Court. Therefore, to preserve the *status quo*, IRI sought a stay of execution of the judgment from the District Court. (Attached hereto as Exhibit F.) On January 16, 1992, that Court denied relief. (Attached hereto as Exhibit G.) IRI then sought from the Fifth Circuit either a writ of mandamus ordering the District Court to stay execution or, in the alternative, an order to stay enforcement of the mandate. (Attached hereto as Exhibit H.) On January 23, 1992, the Fifth Circuit denied the relief. (Attached hereto as Exhibit I.)

A request to this Court is the only remaining avenue for temporary relief. Because Cotton Bros. is actively seeking to enforce the judgment, the current motion to stay enforcement is necessary. Although framed in slightly different terms, the substantive relief sought in each request is identical: a stay to maintain the *status quo* pending the seeking of appellate relief. Consequently, IRI's application is properly before this Court because the same relief has been sought and denied by the District Court and the Fifth Circuit. If this Court grants the stay pending the outcome of the petition for writ of certiorari, IRI will deposit into the Registry of Court an amount satisfying the judgment in full that the interested parties may move to collect immediately should IRI's petition prove unsuccessful.

CONCLUSION

The Application to Stay Enforcement of the Judgment pending disposition of a timely petition for certiorari should be granted.

Dated this 3rd day of February, 1992.

Respectfully submitted,

ZELLE & LARSON

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